United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original - Affidavit of Mailing

74-1002

To be argued by
THOMAS A. ILLMENSEE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1002

JOHN T. ROHE,
Petitioner-Appellant,

—against—

ROBERT F. FROEHLKE, SECRETARY OF THE ARMY, and COMMANDING GENERAL, FIRST UNITED STATES ARMY,
Respondent-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

EDWARD JOHN BOYD, V.
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Preliminary Statement

John T. Rohe, a former member of the New York National Guard, appeals from a decision and order of the United States District Court for the Eastern District of New York (Bartels, *J.*) entered December 12, 1973, denying his mandamus petition seeking a permanent injunction against the appellees herein, Robert J. Froehlke, Secretary of the Army, and the Commanding General of the First United States Army and granting the appellee's motion for summary judgment, dismissing the petition. Appellant's petition sought, *inter alia,* to overturn a determination of the Army which denied his appeal of active duty orders. The order of involuntary activation was based on appellant's unexcused failure in 1971 to attend summer camp.

The sole issue raised in the District Court, and on appeal, is whether the Army and National Guard violated Army

Regulation (AR) 135-91 and a claimed due process right by not giving appellant, without his request, the recommendations, comments and statements obtained by the military in response to the allegations set forth in appellant's appeal letter. Judge Bartels held that the Army and National Guard, in processing Rohe's appeal, had not violated any of Rohe's rights under the Constitution or the regulation. The opinion is reported at 368 F. Supp. 114.

On December 27, 1973 Judge Bartels stayed the enforcement of his judgment and order dismissing the action, pending a determination of this appeal (A. 59, 60).

Statement of Facts

a. The Applicable Army Regulation, AR 135-91

Title 10, U.S.C. § 673a authorizes the involuntary activation of a ready reservist who is not participating satisfactorily in the reserve. Army Regulation (AR) 135-91 * deals with policies and procedures governing satisfactory participation. Paragraph nine of the regulation gives a unit commander the discretion to excuse an absence from summer camp. Paragraph 11 prescribes the activation procedure based upon an unexcused absence from summer camp. Paragraph 14 deals with the issuance of active duty orders, and gives a reservist the right to appeal within 15 days after being notified that active duty orders have been requested. AR 135-91, ¶ 14b(1).

Paragraph 20d permits appeals of involuntary orders to active duty. The written appeal contemplated by the regulation should ". . . explain those facts pertinent to [the reservist's] case which he feels were not fully considered, and may include any additional appropriate evidence which

* A certified copy of the regulation was filed with the Government's summary judgment motion papers in the District Court as "Exhibit B" and is a part of the record now before this court.

the applicant may wish to present." AR 135-91, ¶ 20a. The appeal is submitted through the unit commander (¶ 20b) to the "approving authority",* who, when a denial of the appeal "is indicated", forwards the appeal with his recommendations through the Chief, National Guard Bureau, Department of the Army, Washington, D.C., to the Commanding Officer, United States Army Reserve Components Personnel Center, Fort Benjamin Harrison, Indiana. AR 135-91, ¶¶ 20c(2)(a), 20d. The Commanding Officer convenes an appeal board to determine findings and submit recommendations to him for a determination of the appeal. AR 135-91, ¶ 20e.

b. The Processing of Rohe's Appeal of Active Duty Orders

John T. Rohe enlisted in the New York Army National Guard on November 9, 1967 for a term of six years (A. 62, 63) and simultaneously became a member of the Army National Guard of the United States, a reserve component of the United States Army. 10 U.S.C. § 261(a); 10 U.S.C. § 3062(c). The 1971 summer camp for the members of Rohe's reserve unit commenced on June 26, 1971. Rohe, a New York City Policeman, failed to attend summer camp, and his unit commander requested that active duty orders be issued for Rohe, pursuant to 10 U.S.C. § 673a and AR 135-91. Rohe was informed by letter dated July 2, 1971 that he had been reported for involuntary active duty for missing summer camp (annual training) (A. 101). The request for active duty orders was approved through the chain of command (A. 96-103) and by letter dated September 15, 1971, appellant was informed that active duty orders would be published in about thirty days (A. 104, 105).** This form letter further advised Rohe that he could

* In this case, the New York State Adjutant General.

** Orders for active duty were issued on October 8, 1971 which required Rohe to report to Fort Dix, New Jersey on November 15, 1971 (A. 109). The original orders were amended three times to allow for the processing of Rohe's appeal (A. 111-113). The final reporting date was April 17, 1972 (A. 113).

appeal the call-up by filing a written appeal with supporting documentation within fifteen days, and that a National Guard representative would be available to explain the procedure utilized under AR 135-91 (A. 57, 58, 104, 105).

Rohe's appeal was set forth in his letter to the National Guard dated September 22, 1971 (A. 106, 107). This nineteen paragraph letter alleged in part that "Due to sickness and injury [he] sustained prior to June 26 [he] was on sick report with the Police Department, unable and unfit for duty." Rohe further stated that by the time his unit had returned from summer camp, ". . . [he] had seen [his] police department surgeon and had been ordered back to duty." In addition, the letter sets forth contentions about New York Police Department orders and regulations, and that Rohe had explained the "circumstances" of his absence from summer camp to the Inspector General, Major Curran, who, according to Rohe sympathized with his difficulties. In addition, Rohe made several other allegations in his letter concerning conversations he had had with various army personnel at and around the time he was required to report to summer camp.

By letter dated September 28, 1971, the office of the State Adjutant General advised appellant that his appeal had been received and was being submitted to the commanding officer of appellant's unit, Captain DiTullio, for his comments and recommendations (A. 108). On the same date, Rohe's appeal letter was sent by the Adjutant General to Captain DiTullio "inviting" his attention to the contents thereof (A. 135). In response to the appeal, DiTullio obtained statements from the unit's first sergeant (Santagata) (A. 68) and medical officer (Dr. Petrillo) (A. 69), and transmitted the statements to the Adjutant General (A. 73, 74).

In his statement, first sergeant Santagata represented that at the last drill prior to summer camp, Rohe had claimed that he was presently on sick leave from the New

York City Police Department, that he had a letter from the police surgeon, and that he had a hospital appointment for June 28, 1971. Santagata's statement further stated that Rohe then recanted his claims, and admitted being on vacation, not having a hospital appointment, and flushing the police surgeon's letter "down the toilet bowl". Santagata concluded his statement by confirming that Rohe's battalion surgeon ordered Rohe to report to summer camp (A. 68).*

The battalion surgeon, Dr. Petrillo, also stated that Rohe repudiated his story about having a letter from the police surgeon and being on sick leave. Dr. Petrillo further mentioned that he told Rohe he was able to attend summer camp, and that he ordered Rohe to so attend (A. 69).

On October 21, 1971, after receiving the statements from Sergeant Santagata and Dr. Petrillo the Adjutant General asked Rohe's commander, Captain DiTullio, to respond on a "point by point" basis to Rohe's appeal allegations (A. 75-77). Captain DiTullio responded to the allegations by letter dated October 28, 1971 (A. 78, 79). Attached to DiTullio's letter was a statement given by the company clerk, Frank S. Green (A. 71, 72), a note to the Inspector General, Major Curran, from appellant (A. 95), and the Inspector General's response thereto (A. 138, 139).

The statement from the company clerk responded to paragraph 10 of Rohe's appeal letter, and provided that he called Rohe at 8:00 A.M. on June 26, 1971 to find out why he had not reported to the armory for the start of summer camp. After Rohe alleged that he was sick with an ulcer, Green informed Rohe that he would be carried as AWOL from summer camp because he had not been excused by the battalion surgeon (A. 71, 72). The written communications to and from the Inspector General were relevant to para-

* Rohe's encounter with Santagata and the battalion surgeon, at the last drill prior to summer camp, was apparently on June 22, 1971 (A. 78, ¶ C).

graphs 13 and 14 of the appeal letter (A. 107). The Inspector General's note indicated that Rohe claimed a lack of transportation as his excuse for missing summer camp.

Captain DiTullio along with other authorities in the chain of command recommended that Rohe's appeal be denied (A. 79-81).

On November 3, 1971 the Adjutant General sought a clarification of previous transmittals from Rohe's unit (A. 82). A reply was sent on November 17, 1971 (A. 84, 85). Thereafter, the Adjutant General sent a two page letter to the unit on December 1, 1971, making further inquiries (A. 86, 87). Captain DiTullio responded by letter of January 15, 1972 with several attachments (A. 90). One attachment to the DiTullio letter to the Adjutant General was DiTullio's letter to the New York City Police Department "medical unit", inquiring into Rohe's claim about police department orders that allegedly kept him from attending summer camp, and inquiring about when Rohe was on police sick report during summer camp (A. 141). The police department's reply to DiTullio's letter states in part that Rohe called in sick on June 26, 1971, and after being examined, was returned to full duty effective 8:00 A.M., June 27, 1971 (A. 70). The third attachment to DiTullio's letter to the Adjutant General was a copy of a letter dated June 28, 1971, to Rohe confirming his AWOL status from summer camp, and apparently giving him a last chance to avoid involuntary active duty (A. 94).

In consideration of Rohe's allegations, and based upon the facts as presented by Rohe's unit, it was recommended by the entire chain of command that Rohe's appeal be disapproved (A. 89-93). The United States Army Reserve Components Personnel and Administration Center Delay Appeal Board was convened in St. Louis, Missouri on March 17, 1972 to make a determination of Rohe's appeal. The appeal board's recommendation of disapproval was approved

by the convening authority on March 21, 1972 (A. 114-120). On April 3, 1972, Rohe received written notice by mail that his appeal was denied (A. 131, 132).*

Notwithstanding that his appeal was denied, Rohe failed to appear at Fort Dix, New Jersey, on April 17, 1972 as ordered, and thereafter was listed as AWOL from Fort Dix on that date (A. 121, 122). On May 16, 1972, Rohe had still not reported and was dropped from the rolls as a deserter (A. 121, 123). Rohe was arrested on June 18, 1973, pursuant to a Provost Marshal General's warrant (A. 124, 125), by the Armed Forces Police and confined at the Armed Forces Military Police Station, Brooklyn Navy Yard, in anticipation of being transported to Fort Dix, New Jersey.

c. Proceedings Below

On June 18, 1973, the same day appellant was arrested, Judge Judd signed a temporary restraining order releasing appellant from the custody of the Armed Forces Police, and prohibiting his transfer out of the Eastern District of New York (A. 22, 23). Appellant filed a petition for a writ of mandamus on June 19, 1973 (A. 24-29). On June 27, 1973, Judge Bartels signed an order continuing the stay and directing that while it remained in effect, appellant would not receive any active duty benefits. The respondents herein filed a motion for summary judgment on September 17, 1973 (A. 37, 38), supported by certified copies of papers bearing on appellant's administrative appeal (A. 61-134). An answer to the petition was filed on September 27, 1973 (A. 47-48). On October 12, 1973, appellant filed papers in opposition

* The letter of March 31, 1972 is incorrectly referred to at page 129 of the appendix as not having been initially filed with the court. It was filed with the Government's motion papers as "Exhibit C". Pages 134 through 141 were later filed with the court as "Exhibit D"; see the affidavit of Thomas A. Illmensee, Assistant United States Attorney (A. 54-58).

to the Government's motion, which papers included appellant's affidavit (A. 39-46). Other papers filed by the Government, in support of the motion, included an affidavit by a member of the appeal board (A. 49), an affidavit of the Assistant United States Attorney in charge of the case (A. 54-58), and additional certified documents (A. 135-141).

Judge Bartels granted the Government's motion with an order and opinion dated December 10, 1973 (A. 3-19) and judgment was entered dismissing appellant's petition on December 13, 1973. By order dated December 28, 1973, Judge Bartels stayed the enforcement of the judgment, but directed appellant to prosecute his appeal to this Court in an expeditious fashion (A. 59, 60).

ARGUMENT

The judgment of the District Court granting the Government's motion for summary judgment should be affirmed.

As stated above, the State Adjutant General, in processing Rohe's appeal of active duty orders, requested that the commanding officer of Rohe's unit respond to the allegations set forth in the appeal letter dated September 22, 1971. Rohe claims that it was his fundamental constitutional right to file a surrebuttal to the information supplied by his commanding officer and it was "impossible" to exercise this right because the comments were made after his file was "presumably complete".

Appellant's professed legal assertion is that he is not challenging the constitutionality of AR 135-91, but merely attacking the manner in which it was implemented. Rohe contends that the National Guard and Army had an affirmative duty to send to him copies of all papers relevant to the merits of his case which were obtained in response to

the assertions in his letter of appeal. However, Rohe cites no part of AR 135-91, or other regulation specifying such affirmative duty, and indeed, there is none.*

Moreover, the record indicates that appellant did not ask to see any of the recommendations and comments supplied to the State Adjutant General.**

It is manifestly clear that none of Rohe's procedural rights under AR 135-91, were violated. Curiously, Rohe claims that he doesn't seek to have this Court inject a

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* AR 15-6, dealing with officers and boards specifically appointed and ordered to conduct an investigation, provides in part that the individual who is the given subject of the investigation will be given an opportunity to review all relevant material in the file and submit a written rebuttal. AR 15-6, § 26. In the case at bar, the only appointed investigating authority was the appeal board, and AR 135-91, § 20e specifically excludes the application of AR 15-6 to the proceedings (see Judge Bartels' opinion, A. 10, 11). See generally *Friedberg* v. *Resor*, 453 F.2d 935 (2d Cir. 1971); *Nurnberg* v. *Froehlke*, 355 F. Supp. 1187 (S.D.N.Y. 1973), *reversed, Nurnberg* v. *Froehlke*, Docket No. 73-1538 (2d Cir. 1973)).

** In response to an inquiry by the Office of the United States Attorney, Eastern District of New York, the federal respondents supplied the United States Attorney with an affidavit made by Major William M. Toohey, Recorder on the appeal board when Rohe's appeal was considered by the board (A. 49). The affidavit states, in part, that if Rohe had requested copies of documents in his military file while in Toohey's custody, Rohe would have been given the documents. Judge Bartels concurred with the Government's assertions about the availability of the appeal documents (A. 10, 11, 17).

The regulation cited in the Toohey affidavit, AR 345-20, was superseded by AR 340-17 on August 15, 1973. Both regulations were promulgated to comply with the Freedom of Information Act, 5 U.S.C. § 552. Appellant attacks Major Toohey's affidavit because it goes on to state that Rohe would have been given the documents "... on condition that he described the documents that he desired". A fair reading of the affidavit, rigidly premised on the language of AR 345-20, indicates that all Rohe had to do to obtain any desired information was to give a general description of the documents so that they could be located (see Judge Bartels' opinion, A. 11).

procedural step into the regulation, but nevertheless alleges that the processing of the appeal in conformity with the regulation, constituted a denial of due process. This Court, speaking broadly of due process required when "governmental action" affects private interests, stated in *Hagopian* v. *Knowlton,* 470 F.2d 201, 207 (2d Cir. 1972):

> . . . due process is not a rigid formula or simple rule of thumb to be applied undeviatingly to any given set of facts. On the contrary, it is a flexible concept which depends upon the balancing of various factors, including the nature of the private right or interest that is threatened, the extent to which the proceeding is adversarial in character, the severity and consequences of any action that might be taken, the burden that would be imposed by requiring use of all or part of the full panoply of trial-type procedures, and the existence of other overriding interests, such as the necessity for prompt action in the conduct of crucial military operations.

"Military due process" (see *Friedberg* v. *Resor,* 453 F.2d 935 (2d Cir. 1971) constitutes the well known rule that when an armed service establishes a procedure for accomplishing administrative action, it must adhere to the procedure and that, having done so, a reviewing court will inquire no further. *Reaves* v. *Ainsworth,* 219 U.S. 296 (1911); *Keister* v. *Resor,* 462 F.2d 471 (3d Cir. 1972); but see *O'Mara* v. *Zebrowski,* 447 F.2d 1088 (3d Cir. 1971). In a case involving the activation of a ready reservist, *Antonuk* v. *United States,* 445 F.2d 592, 595 (6th Cir. 1971), Judge McGee held that ". . . the due process clause here requires us not to measure the Army regulations against some constitutional standard, but instead to determine whether the regulations were followed." Similarly, in *Smith* v. *Resor,* 406 F.2d 141, 145 (2d Cir. 1969), Chief Judge Kaufman stated:

> Accordingly, a federal court may properly examine the decision to call a reservist for active duty in order to determine if the reservist's procedural rights under the applicable statutes and military procedures and regulations were violated in a manner which caused substantial prejudice to the reservist. This does not involve any undue interference with the proper and efficient operation of our military forces because we require only that the Army carry out the procedures and regulations it created itself.

Assuming for argument purposes that the federal courts may examine the administrative action activating a reservist, not only to see if regulations were complied with, but also to decide if the reservist was denied due process, it is clear that Rohe suffered no such denial. Initially, it should be noted that every court which has considered the constitutionality of AR 135-91 has found it to comport with constitutional standards of due process.

Thus, the court in *O'Mara* v. *Zebrowski,* 447 F.2d 1085 (3d Cir. 1971), even though it suggested that the Supreme Court's holding in *Reaves* v. *Ainsworth, supra,* was no longer correct because of the expansion of the concept of due process, nonetheless found AR 135-91 constitutional. The *O'Mara* court stated:

> . . . the Court has fairly consistently adhered to the concept that the civilian courts are to inject themselves into the internal operations of the military only in extraordinary circumstances, and this consideration is pertinent when federal courts are asked effectively to rewrite the military's internal procedures. 447 F.2d at 1089.

In *O'Mara,* the petitioner challenged the constitutionality of AR 135-91 based on a number of due process contentions. He specifically averred that the regulation was unconstitutional because it did not require that the reservist be given a copy of the recommendation of the area commander to the

appeal board. The court held that in the factual context in which the regulation operates, the regulation was not constitutionally defective, and that O'Mara had been afforded due process. 447 F.2d at 1090; see *Caruso* v. *Toothaker,* 331 F. Supp. 294, 301 (M.D. Pa. 1971). In addition, other courts have considered the review procedures of AR 135-91, and held that they are constitutionally sufficient. *Keister* v. *Resor,* 462 F.2d 471 (3d Cir. 1972); *Antonuk* v. *United States,* 445 F.2d 592 (6th Cir. 1971); *Ansted* v. *Resor,* 437 F.2d 1020 (7th Cir. 1971).

To advance his theory that an issue of constitutional dimensions is present in the case, appellant relies upon pre-induction, and in-service conscientious objector cases, and places paramount importance on *Crotty* v. *Kelly,* 443 F.2d 214 (1st Cir. 1971) which is based on the Court's opinion in *Gonzales* v. *United States,* 348 U.S. 407 (1955) which reversed in *Gonzales* a court of appeals decision which had affirmed a criminal conviction for defendant's refusal to submit to induction. The Court held that Gonzales should have been given an opportunity to rebut an unfavorable report of the Department of Justice to the appeal board with respect to his claim of conscientious objector status.* In *Crotty,* Judge Coffin held that an in-service conscientious objector was entitled to have access to reports made by a psychiatrist, a chaplain, a hearing officer, and the recommendation of his commanding officer. The court stated that a denial of access to the reports violated due process because the petitioner could not effectively present his position to the review board without knowing the contents of the reports and recommendation.**

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* The Department of Justice Report was never requested by Gonzales. 348 U.S. at 418.

** The opinion in *Crotty* v. *Kelly, supra,* states that Crotty was "denied access" to the reports and recommendation. Crotty's counsel attempted, without success, to inspect documents bearing on Crotty's conscientious objector claim, and Crotty's activation as an unsatisfactory reservist in the New Hampshire National Guard. Brief for Appellant Crotty at 4, 18.

Both *Gonzales* and *Crotty,* as well as their progeny are distinguishable from the case at bar. It cannot be seriously or reasonably argued that the due process requirements, where a citizen is being subjected to a criminal prosecution for failure to submit to induction, are the same as those to be applied in the activation of a reservist. Likewise, a decision refusing to discharge a conscientious objector is very different from the administrative action calling to active duty a reservist who has not participated satisfactorily. There is strong national policy * in favor of exempting a person from military service whose beliefs constitute a firm and sincere objection to "war in any form," and the administrative procedures in conscientious objector cases are unique and differ from those set forth in AR 135-91.** The difference between a decision to activate a reservist and a decision denying a conscientious objector claim is further accented by the difference in judicial review for both cases. The federal courts will examine the merits in conscientious objector cases to determine if a basis in fact for the military decision is present in the record. However, in reservist cases, the courts only focus on the procedure utilized to call up the serviceman, *supra.* The purpose of involuntary activation, authorized by 10 U.S.C. § 673a is: ". . . to maintain the military proficiency that is otherwise maintained by attendance at unit training assemblies", and is not punishment. *O'Mara* v. *Zebrowski, supra,* at 1089; *Keister* v. *Resor, supra,* at 475. This court, in *Hagopian* v. *Knowlton, supra,* at 208 stated: ". . . the consequence [of ordering a ready reservist to active duty] is limited primarily to changing the form of service required to satisfy [the reservist's] voluntarily assumed military obligation. . . . " Similarly, Judge Bartels held that the due process

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* See 50 U.S.C. App. § 456(j) and DOD Directive 1300.6, and the plethora of federal court decisions dealing with pre-induction, and in-service conscientious objectors.

** Compare AR 135-91 with AR 135-25, one of several armed service regulations specifying procedure for processing conscientious objector applications.

requirements in conscientious objector cases are higher than the cases involving enlisted reservists, and that appellant's reliance on *Crotty* v. *Kelly, supra,* and *Gonzales* v. *United States, supra,* was misplaced (A. 18). It should also be noted that the holding in *Crotty,* even with respect to conscientious objector cases, has not been firmly established in this circuit. See, *Nurnberg* v. *Froehlke,* 355 F. Supp. 1187 (S.D.N.Y. 1973), *reversed, Nurnberg* v. *Froehlke,* Docket No. 73-1538 (2d Cir. 1973).

Appellant acknowledges that due process does not here require trial-type procedures, but he does assert that he has been denied an "effective and meaningful" appeal. See *Baugh* v. *Bennett,* 329 F. Supp. 20 (D. Idaho 1971). It is respectfully suggested that if Rohe didn't have a "meaningful" appeal, his own actions are the cause and that he was dealt with fairly by the military. It appears that Rohe's lack of concern and cavalier attitude about his unexcused absence from summer camp, carried over to the presentation of his case to the appeal board.* In paragraphs six through ten of his letter of September 22, 1971 Rohe makes vague statements about his "sickness and injury", and with his consistent lack of candor, states that he was on "sick report" on June 26, 1971, the first day of summer camp (A. 101, 102). Rohe's lack of candor was recognized by the district court (A. 6, 7). He failed to mention that he was returned to the duty roll of the police department on June 27, 1971, which was a fact made known to the appeal board, and a fact acknowledged in his artfully worded affidavit filed in opposition to the Government's motion (A. 41-46). Appellant maintains that the "insertion" of police Captain Sibon's letter (A. 70) was improper, but does not deny the truth of the statements therein. Incredibly, the statement

* This attitude is further manifested by Rohe waiting until he was arrested as a deserter before seeking judicial review of the call-up, and presenting his constitutional claim to the district court.

by Sibon that Rohe was returned to the police duty rolls at 8:00 A.M. on June 27, 1971 is characterized as a mere "bookkeeping record" by appellant (Brief for Appellant at 9).

Rohe never stated the nature of his alleged illness to the appeal board, and never contended that he supplied his unit commander with the documentation specified in AR 135-91, ¶ 9 as being a necessary basis for a discretionary decision to excuse a reservist from annual training. In his affidavit and appeal letter, Rohe does not deny that the battalion surgeon, Lt. Petrillo, informed Rohe that he was physically able to attend summer camp, and would receive a complete physical examination while at camp. Indeed, Rohe does not even bother to deny that he was on vacation when annual training was in process. Therefore, it is apparent why the appeal board held that Rohe wilfully violated the specific guidance given to him about the consequences of his missing summer camp, and that the excuses he gave were unsupported and unacceptable (A. 116-118).

Pursuant to AR 135-91, ¶ 20, Rohe filed his appeal within the prescribed time limit. Shortly thereafter, Rohe was advised in writing that his appeal letter was received, and it would be submitted to his commanding officer for comments and recommendations (A. 108). As stated above, various comments and recommendations were obtained which were responsive to, and rebutted, the assertions made by Rohe in his appeal letter. Appellant contends that the statements obtained from the members of Rohe's unit and the police department were not "comments and recommendations", and therefore, should not have been transmitted to the Adjutant General and the appeal board. This assertion is illogical and inconsistent with the purpose of AR 135-91. Any reasonable "recommendation or comment" made by a person in the chain of command, would have to be based on *fact*. Rohe set forth his statement of the facts in the appeal letter. It was incumbent on the National Guard to give an

accurate version of the facts pertaining to Rohe's unexcused absence from summer camp, and it would have been proper either for those facts to be summarized in a letter or recommendation or comment, or for the facts to be set forth in statements accompanying letters sent by officers in the chain of command. Indeed, it appears that obtaining subscribed, written statements from those with personal knowledge of the occurrence would be preferable, and result in a more accurate account of the facts.

Thus, the record reveals that Rohe was informed in writing that comments and recommendations with respect to his appeal would be obtained. Rohe must have known that some or all of the responses would be unfavorable. Rohe, as a New York City police officer, is assumed to be of at least average intelligence and have an understanding of voluntarily assumed obligations and duties. Indeed, he received some counseling from "legal aid lawyers of the Police Department" (A. 107). He never states that he did study his records or 201 file before or after he filed his appeal, or that he had any intention of doing so. He never says that he asked for, and was denied access to, any papers germane to his appeal. As Judge Bartels held, Army regulations would have permitted Rohe to inspect his file (*supra,* p. 9 fn.). Appellant has *never* proffered an excuse as to why he did not report to summer camp after his "sickness and injury" terminated at 8:00 A.M. on June 27, 1971.

All of the above factors, coupled with the remainder of the record, show conclusively that appellant's denial of due process claim is unfounded. Appellant has attempted to paint a picture of some devious plan by the members of his unit and others to deny him a meaningful appeal. However, the facts show that Rohe was given a fair opportunity to present his contentions, and that his position before the appeal board, the district court was simply untenable.

CONCLUSION

The judgment of the District Court granting the Government's motion for summary judgment should be affirmed.

Respectfully submitted,

March 13, 1974

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 13th day of March 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ two copies of Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Kunstler, Kunstler, Hyman & Goldberg
370 Lexington Avenue
New York, New York 10017

Sworn to before me this
13th day of March 1974

Frances A. Grant

FRANCES A. GRANT
Notary Public, State of New York
No. 41-4503731
Qualified in Queens County
Commission Expires March 30, 1976

Deborah J. Amundsen

DEBORAH J. AMUNDSEN